In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1021

HANEY MIMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After trial without a jury before the United States District Court for the Northern District of Illinois, petitioner was convicted on six counts of a seven-count indictment charging the unlawful sale of narcotics in violation of 26 U.S.C. 4705(a) and 21 U.S.C. 174. Petitioner was sentenced as a second offender to imprisonment for ten years (App. 19-20, 141-142).[1] The court of appeals affirmed.

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[1] References are to petitioner's appendix before the court of appeals which has been filed as a part of the record with this Court.

The evidence may be summarized as follows:

On three separate occasions, September 12, 16, and 26, 1963, petitioner met with an informant, Joseph Branch, and sold heroin to him. The preliminary arrangements and the actual transactions were observed at all pertinent times by federal agents, and on two occasions by a Chicago police officer. These three sales constituted the basis for the first six counts of the indictment.

The procedure followed was substantially the same for all three transactions, and was established by the testimony of Branch, the federal agents involved, and the Chicago police officer. On each occasion, Branch made a telephone call to petitioner from the offices of the Federal Narcotics Bureau in Chicago, and requested a meeting with petitioner (App. 26-30, 72, 74, 85, 119, 124, 126-127). After each rendezvous had been thus arranged, federal agents first searched Branch and determined that he did not possess any narcotics or money (except a small amount of silver), and then provided him with government funds to use in the impending transaction (App. 27-30, 72, 74, 86-87, 119, 124, 126-127). The federal agents, assisted by the Chicago policer officer working with them on special assignment, then surveilled the designated rendezvous point after escorting Branch to the area, and they kept him in view at all times (App. 27-30, 63-65, 72, 74, 87, 119-120, 124, 127, 95-98). On September 12 and 16, the dates of the first two transactions, surveillance was also maintained on petitioner's residence, and his movements to and from the rendezvous point were observed (App. 94-99).

Branch testified at the trial that he had purchased the narcotics on each of the three occasions, and his testimony was corroborated by that of the agents. The chain of custody of the packages, their condition, and the analysis by a government chemist which revealed the contents to be heroin was stipulated and is not contested (App. 137).[2]

There is no merit whatever to petitioner's claim that the evidence was insufficient to sustain his conviction. The verdict was based on the eyewitness testimony of the government informant, which was corroborated by the testimony of the surveilling agents and other law enforcement officers who searched the informant and drove him to the rendezvous. Petitioner's reliance on *Panci* v. *United States*, 256 F. 2d 308 (C.A. 5) is misplaced. In that case the purchaser of the narcotics did not testify, and the government's evidence consisted entirely of the testimony of surveilling agents and extrajudicial declarations by the purchaser. In *Panci*, as in *Gutierrez* v. *United States*, 314 F. 2d 334 (C.A. 5)—which also involved an alleged narcotics transaction observed by government agents—the critical evidence consisted of hearsay. The

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[2] On December 2, 1963, incident to petitioner's arrest at his home, federal agents searched the trash cans in back of his apartment house and discovered a package there that contained traces of heroin (App. 99, 106, 116-117). On motion of the defense, the district judge struck all of the testimony relating to the search and its fruit, and refused to admit the pertinent exhibit into evidence (App. 137-138). Count seven of the indictment was based on the stricken testimony and the excluded exhibit (App. 7-8).

credibility of the informant in this case was, of course, an issue for the trier of fact, and it was resolved against the petitioner.

Petitioner's contention that he was mistakenly found guilty under count seven of the indictment presents no issue for this Court. At most, the record reflects a clerical error. The government conceded in the court of appeals that the verdict applied only to the first six counts of the indictment since the district court had excluded the evidence relating to the seventh count. Petitioner's remedy, if he wants the verdict corrected, is by motion to correct a clerical mistake under Rule 36, Federal Rules of Criminal Procedure. In any event, the sentence imposed does not exceed that prescribed for any one count of the indictment. Since the evidence is sufficient to support a conviction on the other counts, the conviction must be affirmed. *Lawn* v. *United States*, 355 U.S. 339, 359; *Sinclair* v. *United States*, 279 U.S. 263, 299; *Abrams* v. *United States*, 250 U.S. 616, 619; *United States* v. *Cephas*, 263 F. 2d 518, 519 (C.A. 7).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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